Page Litho, Inc. *and* Graphic Communications International Union, Local 20-B, AFL–CIO *and* Graphic Communications International Union, Local 289, AFL–CIO. Cases 7–CA–30106, 7–CA–30106(2), 7–CA–30569, and 7–CA–30569(2)

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On July 10, 1992, Administrative Law Judge Richard H. Beddow, Jr. issued the attached decision. The Respondent and the Charging Party filed exceptions and cross-exceptions, respectively, supporting briefs, and answering briefs, and the General Counsel filed an answering brief. The Respondent filed reply briefs to the Charging Party's and General Counsel's answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings as modified,[1] and conclusions[2] and to adopt the recommended Order as modified.

1. The judge found that the Respondent violated Section 8(a)(5) of the Act by threatening to implement, and actually implementing, changes in terms and conditions of employment for its employees without reaching a lawful impasse in negotiations. The Respondent argues that it never implemented its proposed changes. For the following reasons, we agree with the judge's finding of actual implementation.

The record shows that by letter dated September 15, 1989,[3] the Respondent announced that it would implement its final offer on September 25, unless the Union reached agreement with it by September 22. Later, the Respondent informed the Union that it was paying former striker Greg Owens, who returned to work on October 18, wages and benefits (excluding pension contributions) in accordance with the terms contained in its final proposal, rather than the terms of the expired collective-bargaining agreement. Thus, with respect to the only striking employee who returned to work, the Respondent followed through on its threat.

The Respondent also applied the terms and conditions of its final offer to its replacement employees.[4] When the Respondent hired replacement employees, it did not explain that their terms and conditions of employment were temporary and would be subject to change at the end of the strike. When the strikers offered to return to work, the replacements' terms and conditions did not change. The Respondent did not disavow that it had implemented the changes on a permanent basis. Thus, the Respondent left replacement employees with the reasonable expectation that they were hired under terms and conditions that would continue after the strike ended.

The evidence therefore belies the Respondent's claim that it did not implement its final proposal. We find that the Respondent effectively implemented its unilateral changes when it announced prior to any impasse in bargaining that it would implement its final proposal on September 25 and then followed through on its threat by applying the terms and conditions of its final offer to its replacement and returning employees.

It is well settled that the real harm in an employer's unilateral implementation of terms and conditions of employment is to the Union's status as bargaining representative, in effect undermining the Union in the eyes of the employees. See *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 430 fn. 15 (1967). Here, the damage to the Union's authority as bargaining representative was accomplished by the threat and the actual implementation of the threat to set terms and conditions of employment unilaterally, thereby emphasizing to employees that there was no necessity for a collective-bargaining agreement. *J. Josephson, Inc.*, 287 NLRB 1188, 1190 (1988).

In sum, we agree with the judge that the Respondent threatened to implement and implemented its final

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We do not adopt the judge's statement that the Respondent's counsel was precluded ethically from appearing as a witness. See *Wells Fargo Armored Service Corp.*, 290 NLRB 872, 873 fn. 3 (1988).

[2] In adopting the judge's conclusions, Member Devaney finds it is unnecessary to rely on the judge's reliance on *New Jersey Bell Telephone Co.*, 300 NLRB 42 (1990), enfd. 936 F.2d 144 (3d Cir. 1991). Member Devaney dissented in relevant part in *New Jersey Bell*, but finds the instant case to be distinguishable. Here, in seeking the striker misconduct information the Union did not specifically request any witness statements, and there is also no evidence of any intimidation and harassment of witnesses by the Union.

[3] All dates hereafter refer to 1989, unless otherwise indicated.

[4] Given the circumstances discussed infra, we reject the Respondent's contention that the terms and conditions of employment applied to replacements hired during the strike cannot constitute evidence of implementation. See *Schmidt-Tiago Construction Co.*, 286 NLRB 342 (1987) (where employer discontinued benefit payments during a strike, then incorporated the changes in its contract proposals, and announced that it would implement and soon thereafter implemented the changes, the Board found that the changes were permanently implemented as to the strike replacements as well as the returning strikers, rejecting the employer's contention that the changes were temporary, strike-related measures).

offer without reaching an impasse with the Union in violation of Section 8(a)(5) of the Act.[5]

2. The Respondent excepts to the judge's finding that it violated Section 8(a)(5) of the Act by refusing to provide the names and payroll information of replacement employees to the Union.[6] We agree with the judge. We find unpersuasive the Respondent's contention that it was entitled to withhold the information because it feared harassment of replacements by strikers.

On November 1, the Union requested the names of replacement employees and their payroll records. The Respondent stated that it was reluctant to provide the information because it was concerned that strikers might harass the replacement workers. The Respondent offered to provide the information to a neutral third party.

On November 14, the Union reassured the Respondent that there would be no illegal harassment of the replacements and again requested the information. On November 21, the Union renewed its request and on November 29, without waiving its right to obtain the replacements' names, proposed that the Respondent provide the payroll information with the names excised. On December 4, the Respondent did so.

In May 1990, the Union renewed its request for the names of replacement workers and their payroll records. The Union explained that the records the Respondent had provided were unintelligible and the Union needed the information to monitor vacancies created by the departure of striker replacements and to evaluate the Respondent's wage proposals in light of what working employees were being paid. The Respondent, refusing to provide the information, continued to claim that it feared harassment of strike replacements by strikers.

What is at issue here is whether the Respondent violated Section 8(a)(5) by refusing to provide information the Union requested in May 1990.[7]

Under well-established Board law, a union is presumptively entitled to the names and payroll records of bargaining unit employees, including strike replacements. *Chicago Tribune Co.*, 303 NLRB 682 (1991), enf. denied 965 F.2d 244 (7th Cir. 1992) (names and payroll records of replacements); *Trumbull Memorial Hospital*, 288 NLRB 1429 (1988) (names of replacements); *Georgetown Holiday Inn*, 235 NLRB 485 (1978) (names and wage data of replacements). The employer may withhold the information if there is a clear and present danger that the information would be misused by the union.[8] See *Chicago Tribune*, supra; *Burkhart Foam*, 283 NLRB 351, 356 (1987), enfd. 848 F.2d 825, 833 (7th Cir. 1988); *Pearl Bookbinding Co.*, 213 NLRB 532, 536 (1974), enfd. 517 F.2d 1108 (1st Cir. 1975).

Here, the Union renewed its request for the names and payroll information of replacement employees for the limited purpose of monitoring vacancies among strike replacements and evaluating the Respondent's wage proposals in light of what working employees were being paid. The Union had previously responded to the Respondent's concerns about harassment of replacements by giving assurances against misuse of the names and attempting without success to utilize the payroll records with the names deleted. The Union was not charged with responsibility for any alleged misconduct. No reported incidents of harassment occurred after the strike ended on January 19, 1990.

Given the Union's assurances, the Union's lack of involvement in the alleged misconduct, and the passage of time between the last incidents and the Union's May 4, 1990 request, we find that the Respondent has failed to show a clear and present danger that the Union would use the names to harass the replacements. The Respondent's refusal to provide the names on the Union's May 4, 1990 request was therefore unlawful.

It is true that the Seventh Circuit in *Chicago Tribune* disapproved the Board's clear and present danger test for imposing seemingly too stringent a burden on employers who want to withhold names from a union. However, we think the court's criticism of the Board's rule cannot be divorced from the particular facts of that case, including the presence of picket line violence *contemporaneous* with the union's request and the fact

[5] Because we agree that the Respondent actually implemented its proposal, we find it unnecessary to pass on the judge's finding that the Respondent's announced intent to implement the proposal also amounted to unilateral implementation or on the Respondent's exception to that finding based on *Howard Electrical & Mechanical*, 293 NLRB 472 (1989).

[6] The Respondent moved to strike from the General Counsel's brief the argument that the failure to provide certain information, other than the health plan information, caused or prolonged the strike. The judge rejected the Respondent's request. In its exceptions, the Respondent renews the motion.

Although the judge refused to strike the argument, he did not make the finding the General Counsel urged. Because the argument played no role in the judge's decision, the Respondent was not prejudiced and we therefore deny the Respondent's motion.

[7] Given the facts of this case—the Union's November 1 request, the Respondent's counterproposal, the Union's November 29 revised request, the Respondent's December 4 compliance with that request, and the Union's failure to pursue further information until May 1990—we do not believe the Respondent's actions in November and December constitute an unlawful refusal to furnish information.

[8] The cases cited by the Respondent in support of its contention that it is entitled to withhold the information are either inapposite or instead support the judge's finding. Thus, in *Shell Oil Co.*, 190 NLRB 101 (1971), enf. denied 457 F.2d 615 (9th Cir. 1972), the Board found that the employer was required to provide a list of replacement employees and payroll information in circumstances similar to the facts of the instant case. In *Webster Outdoor Advertising Co.*, 170 NLRB 1395, 1396 (1968), enfd. sub nom. *Painters Local 1175 v. NLRB*, 419 F.2d 726, 737 (D.C. Cir. 1969), the employer was entitled to withhold the names of replacements because, unlike here, the union did not provide assurances on the employer's request that the names would not be used for harassment purposes and the union did not thereafter renew its request.

that the employer offered reasonable alternatives for satisfying the union's ultimate informational objectives of ascertaining striker reinstatement rights.[9] The instant case is factually distinct.

Here, the strike was over on January 19, 1990; no incidents of misconduct were reported after that date; and the Union made a request for the information on May 4, 1990, nearly 4 months after the strike ended and the last reported incidents had occurred. To hold in these circumstances that the Respondent need not provide the requested information would establish an unfortunate precedent, i.e., that on the basis of past strike misconduct, an employer could foreclose for an indefinite length of time the opportunity for the bargaining representative to obtain the names of some of its bargaining unit members.

We conclude that the Respondent's purported fear of harassment was no longer reasonable and that the Union was entitled to the information requested on May 4, 1990. See *Circuit-Wise, Inc.*, 308 NLRB 1091, 1095–1096 (1992); *Pearl Bookbinding Co.*, 213 NLRB 532, 535 (1974), enfd. 517 F.2d 1108 (1st Cir. 1975).

Thus, even if the *Chicago Tribune* court is correct that, in evaluating informational requests between employers and unions, employers are entitled to a standard that is more solicitous of the interests of employees who stand as third parties, we do not see how the latter's interests are given short shrift by our holding in the instant proceeding.

3. The Respondent in its exceptions contends that it did not unlawfully fail to provide information regarding the Respondent's pension contributions on behalf of employee Greg Owens. The evidence shows that on November 21, the Union requested ''information'' regarding the pension contributions paid for Owens. Shortly thereafter, the Respondent informed the Union that it was paying pension contributions for Owens consistent with the expired collective-bargaining agreement. On May 4, 1990, the Union requested ''documentary'' evidence of the contributions. On May 31, 1990, the Respondent provided documentation. It is unclear from the judge's decision whether he found a violation for a failure to provide information regarding Owens. In any event, we find that the Respondent responded to both requests and therefore did not violate the Act as alleged.

4. The judge's recommended remedy provided that backpay for the strikers was tolled on April 18, 1990, ''the date the employer offered placement to some employees.'' However, at the hearing, the judge ruled that the issue of whether backpay should be tolled would be left to the compliance stage of the proceeding. Accordingly, we find the judge's determination to toll backpay to be premature. We shall leave the backpay determination to compliance.[10]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Page Litho, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

''(c) Offer strikers (including sympathy strikers) who offered to return to work immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging, if necessary, replacements hired after September 22, 1989, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of the decision, and expunge from its files any reference to strike misconduct or discharge and notify them in writing that this has been done and that evidence of these matters will not be used as a basis for future personnel actions against them.''

2. Substitute the attached notice for that of the administrative law judge.

[9] The court was troubled that the test as a practical matter seemed to impose on the employer an ''insuperable burden of proving that the union [would] in fact use the information to harass'' replacement workers. While there was no evidence linking the union to the violence and the union had offered assurances against misuse of the list of names, in the court's eyes the situation posed a sufficient likelihood that replacement workers would be anxious over possible harassment at home and elsewhere if their names were given to the union. To the court's way of thinking, an employer was entitled to take this concern into account in denying the union's request for the names.

The court speculated that the Board had been drawing on the clear and present danger jurisprudence under the First Amendment to define the employer's proof burden for withholding requested information. With all respect, we do not agree; there is nothing in our decisions that support this account of the rule's animating principles.

[10] We shall modify the judge's recommended Order and notice to make clear that our Order is not limited in the manner prescribed in the judge's remedy. We shall also provide the standard reinstatement remedial language.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to delay in providing the Graphic Communications International Union with requested information relevant to its duties as collective-bargaining representative of employees in the appropriate bargaining unit.

WE WILL NOT fail or refuse to bargain in good faith with the Union as collective-bargaining representatives of employees in the appropriate bargaining unit.

WE WILL NOT unilaterally implement any final proposal without first bargaining to impasse.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL offer strikers (including sympathy strikers) who offered to return to work immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging, if necessary, replacements hired after September 22, 1989, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL expunge from our files any reference to allegations of strike misconduct or discharge and WE WILL notify them in writing that this has been done and that evidence of these matters will not be used against them in any way.

WE WILL, on request, supply the Union with the information described in the judge's decision that has not already been furnished.

WE WILL, on request, rescind all or part of the ''final'' proposal illegally implemented on or after October 2, 1989.

WE WILL, on request, bargain in good faith with the Union as the exclusive bargaining agent of the above appropriate unit of its employees with respect to their wages, hours, and other terms and conditions of employment and embody any understanding reached in a signed agreement.

PAGE LITHO, INC.

DECISION

STATEMENT OF CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Detroit, Michigan, between November 19 and 28, and December 11 and 14, 1990. After a series of delays related to Respondent's ongoing bankruptcy proceeding, trial resumed on December 17 and the hearing was concluded on December 18, 1991. The proceeding is based upon a initial charge filed, January 12, 1990,[1] by Local 20-B and Local 289, Graphic Communications International Union, AFL–CIO. The Regional Director's consolidated complaint dated August 16, 1991, as amended, alleges that Respondent, Page Litho, Inc., of Detroit Michigan, violated Section 8(a)(1), (3), and (5) of the Act by its unreasonable delay in providing requested information to Local 20-B relevant and necessary to contract negotiations and the performance of its function as exclusive representative of unit employees; by its unilateral implementation of what it referred to as its final offer proposal, without having reached a good-faith impasse in negotiations; and by its discharge and refusal to reinstate striking employees on whose behalf an unconditional offer to return to work was made.

Pursuant to the partial settlement achieved between the parties and stated on the record on December 17, 1991, the Respondent agreed to rescind all discharges of striking employees for misconduct, and the Union agreed to withdraw all charges regarding such discharge. Inasmuch as the Respondent contends that the employees were economic strikers, and the General Counsel and Union maintain they were unfair labor practice strikers, the reinstatement rights of all strikers are related to the determination of that issue.

The consolidated second amended complaint was modified at trial and paragraph 20 of the complaint was amended to include an allegation of unreasonable delay.

By motion dated April 3, 1992, the Respondent moves to strike a portion of the General Counsel's brief alleging that the arguments are based on a theory not contained in the complaint or argued at trial. The Charging Party and General Counsel replied. Although the paragraph in question includes references to both information relevant to a health and welfare plan and a pension plan and to both causing and prolonging the strike by the Union, the latter facts are not alleged as a seperate violation and it appears they are relevant to the basic issue of alleged bad-faith bargaining and absence of impasse.

It also appears that information regarding employee Greg Owens, his wages etc., and his benefit funds is relevant to the issue of Respondent's implementation of its ''final'' proposal.

Accordingly, I am not persuaded that good cause is shown that would necessitate the striking of any material in order to provide due process for the Respondent and the motion is hereby denied.

On review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a full service printing and binding company. It annually ships goods valued in excess of $50,000 from its Detroit location to points outside Michigan and it admits that at all times material is and has been an employer engaged in operations affecting commerce within the meaning of Sec-

[1] Additional charges were filed February 22 and May 22, 1990.

tion 2(2), (6), and (7) of the Act. It also admits that the Unions are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

On June 7, 1990, subsequent to the filing of the involved charges and the events upon which they were based, the Respondent filed for bankruptcy. It is in Chapter 11 bankruptcy and has filed a plan of reorganization.

The Respondent, and the Unions, Local 20-B and Local 289, have a history of collective bargaining dating back to 1982, when Page Litho acquired the enterprise. At that time and during the period in dispute, the Locals were separate entities. Subsequently, on October 1, 1990, Local 20-B (representing employees in the bindery) merged with Local 289 (representing employees performing duties related to lithography). They had separate collective-bargaining agreements with Respondent based on the contract negotiated by the Printing Industries of Michigan (PIM), a multiemployer bargaining association of which Page Litho was a member until April 17, 1989,[2] when it served timely notices of withdrawal and a desire to engage in separate negotiations with each Local.

Don MacDonell, the president of Local 20-B, went to Frank Percherski, Respondent's president, advised him that the Union was ready to commence negotiations and, confirming his oral request with a letter, dated June 12. On June 19, 1989, MacDonell sent Percherski another letter offering available bargaining dates in June, MacDonell phoned Jeff Percherski, Frank's son and the production manager, on June 23, and left a message. When the call was not returned, MacDonell sent a letter, dated June 26, and Jeff Percherski phoned and advised that the Company was not yet prepared to begin negotiations. MacDonell confirmed this phone call by letter of June 27, and asserted the importance of getting the negotiations started.

At this point counsel for the Respondent became involved in communications with the Union and on June 28 Counsel Steven Fishman, by letter addressed to MacDonell, alleged (inaccurately) that MacDonell had cancelled a meeting set for June 29, and that if MacDonell did not contact the Employer by July 5 in order to set up another date, the Employer would assume that Local 20-B had no interest in bargaining and would act accordingly. MacDonell responded by letter dated June 30 and refuted Fishman's claims. After further phone contact by MacDonell to Jeff Percherski, a meeting date was set for July 17.

The initial meeting of the parties was a short session attended by Jeff Percherski and Counsel Fishman for the Employer, and MacDonell, Lorraine McClure (first vice president of Local 20-B), and two employee members of the bargaining committee, Helen Adamson and Dan Kocsis. MacDonell and Fishman assumed the roles of spokesmen for the respective parties. Local 20-B presented a proposal and offered explanations and the Employer said it would present its package at the next session, which the parties set for July 19.

On July 19 Fishman presented the Employer's package consisting of 28 economic and noneconomic proposals. From this point on the Union worked from the company proposal, using their numerical references. This session lasted just over an hour. Fishman presented a short form 1986 through 1989 profit and loss statement and expressed a need for flexibility in order to become profitable because the Company was in financial trouble, a claim that MacDonell took as a typical company gambit. The Union asked several questions regarding the proposals which the Union considered to represent a ''drastic reduction'' in terms and conditions of employment.

A third meeting of about 1-1/2 hours was held on July 21, with discussions of a delay of union membership proposal and bereavement pay (the Employer withdrew its proposal regarding bereavement pay when it was pointed out that the expiring contract provided what the Employer was seeking), and MacDonell pointed out for a second time that the appendix C current wage figures were incorrect in the employee's proposal.

A fourth meeting on July 25 resulted in substantial negotiations during a 2-1/2-hour session. The Respondent presented a written proposal confirming the modifications made on July 19. The Union agreed to both company proposal number 1 and to a two-tier vacation schedule with a change in the pro rata system. The Union also counterproposed a 3-year contract, a modified personal leave provision, and that the health, welfare and pension plans remain as originally proposed by the Union and it also reduced its wage packet request. Caucuses were held and several other proposals were discussed with some changes in language and withdrawal of company proposals and a union with a 2-year contract. The Employer responded with an offer to increase the second tier minimum wage rates and increase call-in pay to 4 hours. Near the end of the meeting Fishman expressed a ''hope'' that an agreement would be reached at the next session.

The parties scheduled tentative meeting dates in early August but MacDonell testified that the Employer cancelled these dates until it was agreed to meet again on August 14. On that date Bill Crain, a representative of the International Union, began attending bargaining sessions and he specifically advised Respondent on multiple occasions that he was only there to represent Local 20-B (he also was involved separately in negotiation between the Company and Local 289).

The Employer presented a written package proposal reflecting the changes made at the previous meeting and thereater significant movement and exchange occurred when the Union offered several written proposals including a 2-year contract; a slight increase in the percentage pension contribution rate; health and welfare plans as proposed on July 17; the two-tier vacation plan as proposed by the Employer, with pro rata language; COLA capped at 2 percent the first year and 4 percent the second year; and a new salary progression rate for new hires reflecting a 5 percent reduction in each succeeding grade.

After a caucus by the Company, Fishman complained that the negotiations were proceeding too slowly, whereupon Crain threw up his hands and told the Employer to make its final offer. No suggestion was made that the parties were at impass and the Employer then modified its proposal by withdrawing proposals nos. 7 (temporary help), 15 (holidays), and 23, agreeing to the Union's counterproposal no. 14 (re: vacations), rejecting the Union's counterproposal as to no. 18 (personal leave of absence), and proposing that recognition language (proposal no. 3) remain as set forth in the expired

[2] Following dates will be in 1989, unless otherwise indicated.

contract, that the minimum wage rate for new hires (proposal no. 6) be increased (over the previous proposal), that the probationary period be reduced to 90 days (proposals nos. 16 and 17), and that the notice period be reduced to the end of the grievance procedure (proposal no. 25) be reduced from 60 to 15 days. MacDonell also testified that Local 20-B presented its grievance and arbitration proposal at this session (as well as again on November 21). MacDonell also questioned Jeff Percherski on August 14 about a blind classified ad seeking printers/binders. Percherski said he would have to check with his father but admitted at trial that he knew it was the Company's ad and he didn't respond because he did not believe that such information would have a positive effect on negotiations.

The next day, August 15, Fishman wrote to the Union stating that it had ''made insufficient movement to prevent continued losses by the company'' and reiterated a self-serving description of the last negotiating session which refered to ''the impasse in negotiations'' and concluded that unless the Union accepted the Company's ''final package counter-proposal'' by August 23 it would consider ''that the impasse continues'' and consider implementation of all or any part of the final package and it attached a 4-page proposal.

MacDonell responded by letter dated August 18, disagreeing with Fishman's description of events and that any impasse existed. MacDonell also testified that the proposal attached to Fishman's August 15 letter was silent as to pension plan and inaccurate as to overtime provisions. MacDonell also said that Fishman's letter was inaccurate regarding the Employer having allegedly set a target date of August 1 for an agreement and in its assertion that the Union was responsible for the parties failing to meet then.

On August 22, Respondent sent the Union a new ''final'' proposal with a new target date for acceptance of August 28. This new ''final'' proposal corrected errors in proposals nos. 12 and 18 and offered a wage rate in appendix C which was higher than before but it contained no pension proposal. Fishman's letter reiterated its language regarding impass and its ''final counter-offer'' (at one point referring to the enclosure with the August 15 letter as a ''final counter-proposal'').

MacDonell responded in a letter dated August 25, and advising Fishman that: ''you know as well as I do that the parties are not at impasse,'' and said that he had requested that a Federal mediator be assigned to the negotiations. With the assistance of the Federal mediator, another session for negotiations then was scheduled for September 13.

On September 12, before that meeting, Fishman sent another ''final'' package proposal to the Union with a letter again asserting impasse and setting a new target date of September 15, for acceptance with a threatened date for implementation on September 18.

The parties met on September 13 at the office of Federal Mediator Mike Nowakowski. It lasting for about 1-1/2 hours and each party demonstrated movement. During a discussion of health and welfare, the Union asked for a copy of the proposed health and welfare plan. MacDonell testified that Jeff Percherski said ''I have a copy'' and began to reach for it, but was stopped by Fishman, who indicated that he would send the Union a copy of the proposed alternative health plan. Percherski testified that the Respondent did not yet have an alternative health plan then and that he actually was reaching for preliminary cost data that he had but this was never told to the Union.

The Union otherwise responded to the Employer's ''final'' proposal, by agreeing to proposals Nos. 1, 3, 11, 14, 16, 17, 18, 21, and 24. Respondent caucused and then offered to change the expiration date of the proposed contract to a date more favorable to the Union and to change ''voluntary'' to ''mandatory'' arbitration. It then stated that if the package were not accepted by September 25, 1989, the proposal would revert back to the earlier offer.

In a letter dated September 15, which makes no reference to the negotiations on September 13 in the Federal mediator's office, Fishman states:

> However, in an effort to attract your acceptance and get an agreement, we have decided to delay implementation and have made two significant changes and a wage scale consistent with the package proposal to our final package. These changes to the termination date and grievance procedure are noted in the enclosed revised final package counter-proposal. We also prepared the wage scale consistent with the package proposal. I have also included a whole language red-lined copy of the Agreement.

Fishman's letter concludes with a statement that if it was not accepted by the Union before September 22, it would be implemented by the Employer on September 25 (but it excluded the last offer as to contract expiration date and mandatory arbitration, proposals Nos. 2, 25, and 26).

No requested information regarding the proposed alternative health plan was provided and the red-lined, whole language package contained the pension contribution level of Section 7 changed from that which had been discussed. Also, an alternative plan for new hires in Section 8 that was contrary to the expired contract, without details, and it contained no-strike/no-lockout language that was different and more extensive than that presented at the bargaining table.

Union Local 20-B held a ratification meeting and a vote at the Union's offices on Friday, September 22, after the workday had ended. MacDonell passed out copies of the Employer's ''final'' offer but told members that the ''final'' proposal did not include details regarding the alternative health care or pension plans and told them that it had an unknown starting wage.

MacDonell told the members that the package had been presented as a final offer that would be implemented on September 25, if not accepted and that he thought the Company was not negotiating in good faith and was probably guilty of unfair labor practices. By secret ballot, Local 20-B members present unanimously voted to reject the contract and to strike. MacDonell previously had ordered picket signs and, an hour after the vote, employees began to picket the plant, carrying signs that read ''GCIU Local 20-B on strike . . . unfair labor practices . . . bargaining in bad faith.''

The picketing continued on Saturday and on Monday, September 25, when no members of Local 20-B reported for work. Members of Local 289 called their represenative, President Robert Ogden, upon seeing the picketing and he told them to honor the picket line. These instructions were confirmed at a regular union meeting later the same day.

As noted, Respondent had placed an ad for printers and binders on August 6. Another ad appeared on Sunday, September 24, the day before the day it said it would implement its proposal. Subsequent ads appeared on at least three occasions in October. The Respondent also had hired a security firm and it had its guards in place at the plant on September 25. The record is not clear as to the number, if any, replacement employees who worked the week of September 25, however, several replacement workers testified that they began the following Monday, October 2, or thereafter on October 3 and 4. Employer payroll records for week 41 (payday Oct. 12) show 3 employees and 12 employees, for week 42, all replacements. On October 17 or 18 striking employee Greg Owens returned to work. By letter of November 21, Respondent acknowledged that replacement employees (and Owens) were receiving pay and benefits consistent with the Employer's last offer to the Union.

On October 6, the Union received an audit report, based on the information previously supplied to its accountant, indicating that Respondent was in a weakened financial condition, not in any immediate danger of bankruptcy, but with an unpromising forecast for future profitability.

Thereafter a bargaining meeting, initiated by the Union with the assistance of the federal mediator, was held on November 1. It was a session of less than an hour and was attended for the first time by Union Attorney Ellen Moss.

The Employer presented a new proposal, modifying its ''final'' package of September 13, which changes was a new maintenance of membership proposal that granted employees an option not to join Local 20-B. International Representative Crain advised the Employer that a contract was obtainable if the Employer could move to some degree.

Counsel Moss, requested information regarding the Employer's health plan, which had not yet been provided, and also requested that the Employer provide information with respect to rates of pay, benefits, classifications, and any agreements that the Employer had made with the replacement employees, and that it provide a complete contract free of inaccuracies and employer discretions. Moss also advised the Employer that the Union was prepared to move but must calculate the last offer before responding. She also said that the proposal it had implemented contained nonmandatory subjects of bargaining, which she asked the Employer to withdraw. The Union advised the Employer that it did not believe they were at impasse and requested another date for negotiations.

Letters were exchanged resulting in an agreement to meet on November 21. The mediator did not attend the November 21 meeting, however the Company gave the Union the requested proposed alternative health plan, a Blue Cross 4/5, CMM 100 plan without any written cost information which the Union then requested.

The Company also disclosed that replacement employees and returned striker Owens were being paid consistent with its ''last'' offer. It declined to provide information that would include names of replacement employees but offering disclosure only to a neutral third party. The Union also presented a counterproposal that, in addition to that which had already been agreed to, offered to limit the agreement to the Employer and conform other provisions of the contract (proposal no. 1), to accept a 40-hour workweek of 8 hours–5 days, to accept the employer proposal as to call-in pay, and to suspend any demand for COLA during the first year of the contract.

After a caucus, the Company rejected the proposals except for proposal no. 1. After further discussions the Union asked for another meeting but Fishman indicated that the Company had made its final offer, and he saw no need for any further meeting unless the Union had a modified proposal, in which event he advised the Union to mail it to him for his review, and that he'd schedule another meeting if he deemed it worthwhile. MacDonell responded that the Union did not do its bargaining by mail.

Various letters were exchanged and, in a letter dated November 27, Fishman wrote that ''changed circumstances'' had led to further revisions of the Employer's ''last and final'' position, September 15, including a new maintenance of membership clause, which he outlined at the November 1 meeting enclosed a ''further revised package proposal'' reflecting a minimum starting rate and the health plan given out at the November 21 meeting.

The parties agreed to meet again on December 6 and exchanged further correspondence. At the December 6 meeting (without the mediator), the parties worked from the Employer's most recent November ''final'' proposal. The Union offered an economic concession regarding proposal no. 10, proposing to define a workweek as 40 hours for only 37-1/2 hours of pay, performed 8 hours, 5 days a week, that was not specifically accepted.

The following day Union Counsel Moss wrote Fishman, asserting that the Union had made ''significant concessions'' but that ''every proposal you have made to us has contained errors. . . . it is very difficult to know what we are bargaining over when every proposal is different'' she also wrote that the Union was still reviewing the last company proposal, which the Union found ''interesting'' such that it ''may affect the course of our dispute.''

Counsel Fishman also wrote the Union on December 7, admitted to errors in proposals nos. 6 and 9 of the Employer's latest ''final'' package proposal, and enclosed a copy of the corrected package. There were no further meetings by the parties after December 6, and, on December 26, Fishman wrote to the Union withdrawing the Employer's last ''corrected final package'' offer due to nonacceptance by the Union and he presented another package proposal modifying proposals nos. 6, 10, and adding a new item 30 and appendix B. Moss responded that the Union had never informed the Employer that the December 7 proposal was unacceptable and further complained that the Employer had not provided information as to all benefit plans proposed and implemented. Fishman admitted in a letter on January 12, 1990, that documents in respect to the disability benefits program administered were not yet available to the Employer, but said they would be disclosed to the Union.

Local 20-B decided to end the strike and on January 19, Moss notified Page Litho on behalf of the primary strikers, members of Local 20-B and the sympathy strikers, members of Local 289 that the strike had terminated, on January 18, and the strikers unconditionally offered to return to work.

The Respondent, after notifying the Locals, then directly contacted certain former strikers by letters dated January 26, and the Union wrote to Percherski advising Respondent not to bypass the certified representative. On January 30, 1990, MacDonell requested immediate reinstatement of Local 20-

B strikers as unfair labor practice strikers and Moss requested similar reinstatement for the Local 289 sympathy strikers.

Of 14 employees 6 responded and had meetings on January 31, and February 1. Each employee that attended was presented a copy of the Company's final proposal, by Jeff Percherski, Local 289, representing the terms and conditions under which the employees would be returning to work. Each employee was asked if they were willing to return to work. All stated they wished to study the package and would call Jeff back if they were interested in returning. Carol Tury was the only employee who did so.

As noted, charges were filed on January 12 and February 22.

By letter of March 30, 14 employees, who had not been alleged to have engaged in strike misconduct, were sent letters offering the opportunity to return for work placement on April 18, at prestrike levels of wages and benefits. On the same day letters were sent to other employees refusing to offer reinstatement because of their strike misconduct.

On April 18, 10 employees and the respective Local presidents, appeared at the time set in Respondent's letters. Percherski attempted to go forward with a meeting but told Counsel Moss, who was also present, that she could not attend, and the meeting was never held.

On May 4, Moss wrote to the Respondent and reiterated the employees the employees' offer to return and information request. No further reinstatement contacts were made.

On June 7, 1990, Page filed for Chapter 11 bankruptcy.

On September 4 and 14 Respondent sent a letter suggesting a date for bargaining. The Union replied on September 14 and 17 requesting alternate dates. No further exchange took place prior to the start of the hearing.

III. DISCUSSION

On brief the General Counsel and the Charging Party argue that the Respondent unlawfully refused to furnish to the Union requested information relevant and necessary to evaluation of bargaining proposals and the performance of its duties as the exclusive representative of the 20-B unit employees, that the Respondent did not bargain in good faith, that the parties were not at impasse, and that the unilateral implementation of Respondent's contract proposal was unlawful.

A. *Implementation*

The Respondent initially argues that the General Counsel has failed to meet it burden of proving that it unilaterally implemented its final proposal prior to the strike or at any other time and that therefore the complaint must be dismissed.

Here, the strike by Local 20-B was authorized and began after the regular work day on Friday, September 22, 1989, contemporaneously with a membership vote which rejected the Respondent's outstanding ''final'' contract proposal, a proposal that Respondent had announced it would implement on the next following regular workday, Monday, September 25th. Replacement workers started working on and after October 2 and they, along with Tom Owen, the unit member returned to work on October 18, all were employed under the wage and benefit terms and conditions of the proposal.

Contrary to Respondent's argument, the record shows that its outstanding ''final'' proposal was implemented with a bargaining unit employee on October 18 and that this implementation was consistent with the terms applied to replacement employees who started on and after October 2, the first apparent date of work following the threatened or announced implementation date of September 25. These actions confirm and, in effect, ratify the actuality of Respondent's implementation of its proposal on the first workday opportunity following the announced date of September 25. Here, replacement workers were employed under the same terms applied to unit employees and therefore their wages, etc., are not irrelevant in determining implementation and the unilateral changes resulting therefrom regardless of any actual duty to bargain with the Union over replacements term and conditions of employment during the course of a strike.

Moreover, the record here discloses a situation where the threat of implementation is based upon acceptance within 3 days, of a so-called ''final'' offer that is flawed (as otherwise discussed herein), by a lack of impasse, an incomplete and unclear ''final'' proposal, a failure to supply information requested by the Union, the precrusion [sic] of mandatory subjects of bargaining not discussed at the table and a failure to negotiate in good faith.

Here, we have more than a threat to implement. Here, Respondent has validated its threat by its subsequent actions in unilaterally implementing its last proposal with both replacement workers and returning striker Owens and, accordingly, the Union did not jeopardize the legitimacy of its strike by relying upon the truthfulness of Respondent's threat and starting its picketing, complete with signs alleging employer unfair labor practices, after the close of business on Friday, prior to the threatened day of implementation on the following Monday.

B. *Health and Welfare Information*

On September 13, the Union specifically requested to see a copy of Respondent's proposed health and welfare plan. The Respondent did not produce it, even though Jeff Percherski began to reach for something, indicated that he had information relevant to the proposed plan and presumably would have produced it at that time but for Fishman's intercession and statement to the Union that Respondent would mail them a copy.

The requested copy of the Respondent's proposed alternative health and welfare plan was not provided to the Union until November 21, 1989 (a Blue Cross 4/5, CMM 100 plan), more than 2 months after the request and almost 2 months after the Respondent had included this unspecified alternative plan in its ''final'' offer implemented on September 25.

Respondent contends that it did not have a ''copy'' of the health and welfare plan on September 13, however, I find it to be implausible that it did not have preliminary information on which plan it had selected even if, for example, it didn't have final cost data. Instead of explaining or sharing the information it did have, it chose to quibble, an action which was misleading and an indication of bad faith.

It is clear that the terms of health and welfare benefits usually are a major factor in most collective-bargaining agreements and, in fact, questions on this subject were raised at the union ratification meeting on September 22, and support an interference that the lack of this information contributed to the employees' decision to reject the proposal and to strike rather than return to work on September 25 under an

implemented contract with unknown health and welfare benefits and associate cost.

This information was not provided until November 21 and I further find that this delay also had an effect on and contributed to prolonging the strike. The Respondent's actions in this regard are inconsistent with an employer's obligation to provide all requested information of probable relevance pursuant to the discharge of its statutory responsibilities to the certified representative in a timely manner, see *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967), and *Interstate Food Processing*, 283 NLRB 303, 306 (1987), and, accordingly, I find that the Respondent's initial failure to provide its requested information or adequately explain its failure to comply and its delay in eventual compliance is a violation of Section 8(a)(5) and (1) of the Act, as alleged.

C. *Credibility: Counsel's Letters and Notes vis-a-vis Witnesses' Testimony*

The record shows that Respondent's management did not enter into negotiations with the Union until after it obtained the services of counsel. Thereafter, Owner Frank Percherski never was directly involved in actual negotiations and, although his son Jeff Percherski attended all meetings and caucused with counsel on occasion, Counsel Fishman at all times acted as Respondent's principal spokesman and negotiator both in negotiating meetings and in exchanges of correspondence. Inasmuch as Counsel Fishman chose to act as Respondent's chief labor counsel throughout the course of this proceeding (especially in regard to issues related to negotiations), he therefore was precluded ethically from also appearing as a witness, see *Airport Service Lines*, 231 NLRB 1272, 1279 (1977). Although the Board has chosen generally not to become involved in rulings upon this issue, a situation can arise, as here, where an attorney has actively participated in or dominated the conduct during negotiations which forms the basis for the complaint and therefore direct testimony that would be relevant and necessary for the credible development of the record is not presented on the record.

Here, this has resulted in a record that is burdened with questions on cross-examinations to the General Counsel's and the Charging Party's witnesses and direct question to Jeff Percherski that attempt to elucidate what Counsel Fishman may have said during negotiations. (See, for example, pp. 1310–1311 of the transcript where Percherski is asked by Fishman to testify from Fishman's notes.)

This ''through the back door'' attempt to place what he allegedly may have said in the record while avoiding an appearance as a witness (and also avoiding of the General Counsel's exercising due process rights of cross-examination), is further compounded by a further reliance upon admitted exhibits of his extensive correspondence to the Union and his notes allegedly taken during bargaining sessions.

Fishman's letters (and notes) are self-serving and, although admissible, the recitation of events therein is in the nature of hearsay inasmuch as Fishman, by choosing to continue as counsel and not to appear as a witness was not available to corroborate, confirm or otherwise establish the reliability or truthfulness of the context of the letters and notes he made on behalf of the Respondent.

Although some of Fishman's statements were agreed to by witnesses who were present during the exchanges, I find that witness Percherski sometimes appeared to be led by the suggestions in Fishman's alleged statements and I find such seeming corroboration to be of little value when evaluated against the direct, independent testimony of the General Counsel's witnesses who spoke directly about events occurring during negotiations in terms that conflict with those expressed by Fishman (as noted, Percherski's direct, verbal participation in negotiations appears to have been nominal).

Under these circumstances, Fishman's words essentially are untested by cross-examination or observation of demeanor and I find no persuasive reason to credit the context of Counsel Fishman's letters, notes, and alleged statements (as indirectly recalled by witness Percherski), over the direct, fully examined and highly credible testimony of the General Counsel's witnesses who testified on matters that conflict with matters recited matters in Fishman's letters, notes, and alleged statements.

Accordingly, my recitation and finding of facts set forth above and in the following discussion are based upon the greater credibility and reliability of the General Counsel's witnesses vis-a-vis the material presented by witness Percherski and the notes, letters, and alleged statements of Counsel Fishman.

D. *Existence of Impasse*

The Union sought to commence bargaining on June 12. On June 26 Jeff Percherski said that Respondent was not yet prepared to begin but the Union then was threatened on June 28, by Counsel Fishman (who the Union's knowledge had just entered the picture), with unilateral action by the Company, accompanied by an inaccurate statement that the Union had canceled a meeting for June 29. Thereafter, a short initial meeting was held on July 17, followed by three other 1- to 3-hour meetings on July 19, 21, and 25.

After the Employer canceled intervening dates, a fifth meeting occurred on August 14. Both parties made concessions but Fishman complained that negotiations were moving too slowly and International Representative Crain, who was at his first meeting with Respondent, responded that the Respondent should give the Union a ''final offer.''

The evaluation of the record herein does not involve a consideration of the wisdom or reasonableness of either party's positions at the time of negotiations or subsequently, with the benefit of hindsight. Accordingly, Respondent's feelings that the Union should have realized the seriousness and immediacy of its financial condition is immaterial and the Union cannot be made responsible for the resulting events because it was skeptical of the Employer's claims and therefore was slow to respond to or failed to immediately capitulate to Respondent's terms.

To the extent that Respondent supplied a ''final'' offer, the Union's failure to immediately accept all terms did not create a legal impasse. Fishman's reference to an ''impasse'' in negotiation and his letter of August 15 did not reflect any statements made at the negotiations. The statement was merely self-serving and it was not confirmed by subsequent events. A determination of whether impasse has been reached is governed by the standard set forth in *Taft Broadcasting Co*., 163 NLRB 475 (1967), enfd. sub nom. *AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968):

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the

> parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of the negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Respondent presented a new, ''final'' proposal on August 22 and a changed ''final'' package on September 12, before the parties met with the assistance of a Federal mediator for the first time on September 13, a meeting that demonstrated movement and which also disclosed the existence of a proposed health and welfare plan but absent any meaningful information about its terms. On September 15, Respondent supplied a new, ''red-lined'' proposed agreement with a fourth threatened implementation date set for September 25. This proposal contained some new material, had some inaccuracies and also lacked meaningful information on the health and welfare plan.

It is well established that an employer is not privileged to implement unilateral chnges in terms and conditions of employment by implementing an offer unless there is bona fide impasse, *NLRB v. Katz*, 369 U.S. 736 (1962). Here, the record fails to show such an impasse at either when the strike began after the end of the Friday shift or at the time of the threatened implementation at the start of work on Monday, September 25, or when implementation of unilateral changes became operational with the actual employment of replacement and returning strikers on and after October 2.

The bargaining history in this proceeding demonstrates constantly changing ''final'' proposals by the employee after only a limited number of short bargaining sessions wherein the Respondent began to repeatedly threaten to implement, yet never put the Union in a position to know just what the Respondent's position really was. Here, it appears that these announcements were not predicated on actual impasse but instead were indicative of a failure to bargain in good faith, see *J. Josephson, Inc*., 287 NLRB 1188 at 1190 (1988). Respondent's unilateral conclusion regarding impasse and its threat to implement were made contemporaneously with the parties first meeting with a Federal mediator and are not consistent with the actual state of negotiations which indicate the parties were still in the proposal formulation stage with room to maneuver and with a realistic prospect that continued discussions would be fruitful, rather than fixed position, characteristic of impasse.

Moreover, impasse does not exist where there is movement and the parties continue to make concessions, *Henry Miller Spring Mfg. Co*., 273 NLRB 472 (1984). Here, there was a consistent movement right up to the last threat to implement and, even after implementation, bargaining sessions were held with presentations by Respondent of a modified ''final'' package (which included a new maintenance-of-membership clause), disclosure of the health and welfare plan, a request for relevant plan cost information, and the Union accepted some of these certain proposals.

The record otherwise contains a number of examples of indicia of a lack of good-faith bargaining on behalf of the Respondent. These include Respondent's reticents in setting up the first meeting, canceled the first meeting, and then attempted to blame the cancellation on the Union, *W. R. Hall Distributor*, 144 NLRB 1285 (1963); the placing of the August 6 classified ad for replacements during initial and still fruitful negotiations; changing its ''final'' proposals in ambiguous and incomplete fashion such that the Union could not clearly know what the ''final'' offer was; and its withholding health and welfare information of critical importance to the employees' decision to accept or reject any offer.

Under these circumstances, I conclude that the General Counsel persuasively has shown that a bona fide impasse did not exist when the Respondent implemented unilateral changes in terms and conditions of employment. Accordingly, I find that Respondent has violated Section 8(a)(5) of the Act in this respect, as alleged. See *J. Josephson, Inc*., supra.

E. *Information Regarding Replacement Employees*

On November 1, and again on November 21, the Union asked the Respondent to provide information regarding the rates of pay, benefits, classifications, and any agreements executed between the Respondent and the replacement employees. At the latter date the Union also asked for details of the proposed disability benefit program, the proposed pension plan, and the starting wage proposal.

On December 6 Respondent finally informed the Union that there were no signed agreements between it and replacement employees, even though this fact obviously was known on or about the date of request. At this time the Respondent also provided unidentifiable payroll records which the Union found to be unintelligible. At this meeting the Union asked for pension contribution information Owens, the employee who returned to work after being on strike.

On December 28, the Union renewed its request for information as to all benefit plans, and on January 12, 1990, the Respondent revealed that it as yet had no information concerning the disability program.

There also were poststrike discussions about alleged misconduct by working and striking employees and, on February 1, 1990, the Union requested Respondent to provide information as to the specific misconduct alleged to have been committed by any striker.

By letter dated May 4, 1990, addressed to Frank Percherski and Fishman, the Union formally repeated its information requests for names of replacement employees employed by the Respondent since September 22, 1989; payroll records including names for all bargaining unit employees employed by Respondent since September 22, 1989; specific information regarding alleged misconduct attributable to striking employees; and documentary information pertaining to contributions paid by the Respondent into pension fund on behalf of Owens.

Here, I conclude that the information sought by the Union was relevant and necessary to the Union's peformance of its duties as the exclusive bargaining of unit employees. I also find that although some of this requested information, was provided to the Union, it was not provided in timely fashion, and some information was never provided.

A Union is entitled to timely disclosure of information concerning strike replacements, see *Trumbull Memorial Hospital*, 288 NLRB 1429 (1988); and *Chicago Tribune Co*., 303 NLRB 682 (1991), when the Board found that an employer's delay in providing the names of strike replacements for over a year was a violation of the Act, despite the alleged fear that information would be used to harm or harass the re-

placements. Here it appears that the payroll records requested could help monitor vacancies among strike replacements and such information would be relevant in the context of negotiations, as the Union could evaluate the Respondent's wage proposals in light of what they were paying working employees. Accordingly, failure to provide such information of this nature or delay thereof is a violation of the Act, see *Toledo 5 Auto/Truck Plaza*, 291 NLRB 319 (1988).

The Union also asked for ''information'' concerning allegations of strike misconduct but it did not ask specifically for witness statements. The Employer had apparently completed its investigation at the time it terminated certain employees at the end of March and, as the strike had ended, there was no reason for the Employer to continue to withhold information. An employer is obligated to provide investigative reports relied on by management in its decision to discipline employees. *New Jersey Bell Telephone Co*., 300 NLRB 42 (1990), enfd. 936 F.2d 144 (3d Cir. 1991); *United Technologies*, 277 NLRB 584 (1985), information concerning alleged strike misconduct is necessary and relevant to the Union's proper performance of its duties, see *Certainteed Corp*., 282 NLRB 1101 (1987). Under these circumstances, I conclude that the Respondent is shown to have failed or unreasonable delay in providing requested information and that it has violated Section 8(a)(1) and (5) the Act in this respect, as alleged.

F. *Status as Unfair Labor Practice Strikers*

At the time the employees from Local 20-B voted to go on strike, they were informed that the Employer had not provided requested information about the health and welfare proposal, they were told that the Employer's most recent proposal contained matters not discussed during negotiations, and it was indicated to them that the Union's executive board believed that the facts showed that the Employer was engaging in unfair labor practices. Thereafter, when employees first began to picket their signs alleged that the strike was an unfair labor practice strike and also said ''bad faith bargaining.''

The Union consistently took the position that the strikers were unfair labor practice strikers and, if a strike is caused in whole or in part by the Employer's unfair labor practices, the striking employees are unfair labor practice strikers and entitled to reinstatement upon their unconditional offer to return to work, *Boyles Galvanizing Co*., 239 NLRB 530 (1978). Local 289 employees are also unfair labor practice strikers inasmuch as employees honoring the picket line of unfair labor practice strikers are accorded unfair labor practice striker status. *C. K. Smith & Co*., 227 NLRB 1061 (1977), enfd. 569 F.2d 162 (1st Cir. 1977).

Here, I find that facts show that the Employer's actions during negotiations demonstrated that it was engaged in unfair labor practices and that the striking employee members of Local 20-B as well as the employee members of Local 289 who honored the picket line are all entitled to status as unfair labor practice strikers.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Graphic Communications International Union, Local 20-B, AFL–CIO and Graphic Communications International Union, Local 289, AFL–CIO are, respectively, labor organizations within the meaning of Section 2(5) of the Act and have been at all times material herein, the exclusive representative for purposes of collective bargaining of Respondent employees.

3. By failing and delaying the provision to Union Local 20-B requested information pertaining to details of its health benefit proposal presented in its ''final'' offer and information regarding repalcement employees, terms and conditions provided to replacement employees or details of implemented proposals, or alleged striker misconduct, has violated Section 8(a)(5) and (1) of the Act.

4. By threatening unilaterally to implement changes and by unilaterally implementing changes in terms and conditions of employment on or about October 2, 1989, at which time no bargaining impasse existed, Respondent refused to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

5. The strike which began on September 22, 1989, was an unfair labor practice strike and the striking employee members of Local 20-B as well as the employee members of Local 289 who honored the picket line are all entitled to status as unfair labor practice strikers.

REMEDY

Having found that Respondent has engaged in unfair labor practices, it is recommended that the Respondent be ordered to cease and desist therefrom and to take the affirmative action described below which is designed to effectuate the policies of the Act.

Inasmuch as the strike, which began September 22, 1989, was an unfair labor practice strike, it is recommended that the strikers (including sympathy strikers), who unconditionally offered to return to work on January 18, 1990, be reinstated to their former jobs or a substantially equivalent position, without prejudice to their seniority or other rights and privileges previously enjoyed, and made whole for any loss of earnings they may have suffered because of the discrimination practiced against them by payment to them a sum of money equal to that which they normally would have earned from the date of the discrimination and the record herein to the date of reinstatement (here, the tolling date should be April 18, 1990, the date the Employer offered placement to some employees and were denied them the opportunity to meet with management with their counsel present, in accordance with the method set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),[3] and that Respondent expunge from its files any reference to discharge for alleged strike misconduct and notify them in writing that this has been done and that evidence of the discharges will not be used as a basis for future personnel action against them.

Having found that Respondent violated Section 8(a)(5) and (1) of the Act by and failed to bargain in good faith by refusing or delaying the production of described information requested by the Union, by unilaterally implementing a

[3] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

''final'' proposal without bargaining to impasse, and by subsequently refusing or delaying the production of other described information requested by the Union it is recommended that on request of the Union, Respondent be ordered to furnish the information requested, to rescind all or part of the implemented ''final'' proposal, and to bargain in good faith with the Union as the exclusive bargaining agent of the above appropriate unit of its employees with respect to their wages, hours and other terms and conditions of employment and embody any understanding reached in a signed agreement.

Otherwise, it is not considered to be necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Page Litho, Inc., Detroit, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and delaying the provision to Union Local 20-B of requested information relevant to its duties as the certified collective-bargaining representative of employees in the appropriate bargaining unit.

(b) Failing and refusing to bargain in good faith with Union Local 20-B as the collective-bargaining representative of its employees in the certificated unit.

(c) Unilaterally implementing any so-called ''final'' proposal without first bargaining to impasse.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, supply the Union with the information described in the above decision that has not already been furnished.

(b) On request, rescind all or part of the ''final'' proposal illegally implemented on or after October 2, 1989, and on request bargain in good faith with the Union as the exclusive bargaining agent of the above appropriate unit of its employees with respect to their wages, hours, and other terms and conditions of employment and embody any understanding reached in a signed agreement.

(c) Offer all strikers (including sympathy strikers) who offered to return to work immediate and full reinstatement and make them whole for the losses they incurred as a result of the discrimination against them in the manner specified in the remedy section, and expunge from its files any reference to strike misconduct or discharge and notify them in writing that this has been done and that evidence of these matters will not be used as a basis for future personnel actions against them.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Detroit, Michigan facility copies of the attached notice marked ''Appendix.''[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''